

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT  
FOR SUFFOLK COUNTY  
NO. SJ-2019-0366

BOSTON MUNICIPAL COURT  
DEPARTMENT  
CENTRAL DIVISION  
No. 1901CR004769

COMMONWEALTH

vs.

RODERICK WEBBER

JUDGMENT

This matter came before the court, GAZIANO, J., on the Commonwealth's emergency petition for relief pursuant to G. L. c. 211, § 3, from a Boston Municipal Court judge's refusal to accept entry of a nolle prosequi by the Commonwealth in this case, where a complaint had issued against the defendant for disorderly conduct under G. L. c. 272, § 53 (b).

1. Standard of review. Relief under G. L. c. 211, § 3, is extraordinary and shall be granted only where the petitioner establishes a substantial harm to a substantive right that cannot be remedied in the ordinary course. See Black v. Commonwealth, 459 Mass. 1003 (2011). Here, the Commonwealth has established that it is entitled to such relief. The judge's refusal to accept the

Commonwealth's entry of a nolle prosequi, on the purported ground of a violation of G. L. c. 258B, § 3 (g), precluded the Commonwealth from exercising a fundamental right guaranteed by art. 30 of the Massachusetts Declaration of Rights. See Commonwealth v. Cheney, 440 Mass. 568, 574 (2003); Mass. R. Crim. P. 16. The judge's decision, purporting to "deny" the entry of a nolle prosequi, and apparently requiring the Commonwealth to prosecute a case it has deemed inappropriate for prosecution, is not reviewable under any other established procedure.

2. Discussion. a. Authority under article 30.

Fundamentally, the judge had no authority to "deny" the Commonwealth's entry of a nolle prosequi. His effort to do so violated the Commonwealth's constitutional rights under art. 30 of the Massachusetts Declaration of Rights, and infringed upon the separation of powers enshrined therein. "In the government of this [C]ommonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men." Article 30 of the Declaration of Rights of the Massachusetts Constitution.

"In the context of criminal prosecutions, the executive power

affords prosecutors wide discretion in deciding whether to prosecute a particular defendant, and that discretion is exclusive to them." Cheney, 440 Mass. at 574, and cases cited. The prosecutor's sole authority to determine which cases to prosecute, and when not to pursue a prosecution, has been affirmed repeatedly by this court since the beginning of the nineteenth century. Commonwealth v. Wheeler, 2 Mass. 172, 174 (1806) ("The power of entering a nolle prosequi is to be exercised at the discretion of the attorney who prosecutes for the government, and for its exercise he [or she] alone is responsible"). See Commonwealth v. Gordon, 410 Mass. 498, 500 (1991) (noting "long-standing proposition that the decision to nol pros a criminal case is within the discretion of the executive branch of government, free from judicial intervention"); Manning v. Municipal Court of Roxbury District, 372 Mass. 314, 318 (1977), and cases cited ("A district attorney has wide discretion in determining whether to prosecute an individual, just as he [or she] has wide discretion in determining whether to discontinue a prosecution once commenced").

b. Victims' bill of rights. At the hearing, the judge issued an oral order that the Commonwealth's "motion" to enter a nolle prosequi was "denied;" this language also appears in a margin notation on the Commonwealth's filing. The judge stated at the hearing, over the Commonwealth's repeated objections, that the ground

of denial was that the Commonwealth had failed to comply with the provisions of G. L. c. 258B, § 3 (g), that it notify the "victims" of the offense so that they could appear at the hearing, or have an opportunity to "confer" with the prosecutor prior to the termination of the case.

According to the judge, the "victims" of the defendant's alleged disorderly conduct are the members of Super Happy Fun America, whose one-mile "Straight Pride Parade" the defendant and approximately 2,000 others were protesting; the judge determined that the defendant's actions interfered with the marchers' exercise of their rights to free speech under the First Amendment to the United States Constitution. This was error for several reasons.

First, the offense of disorderly conduct, G. L. c. 272, § 53 (b), is an offense against the public and not against a specific victim. See Commonwealth v. Accime, 476 Mass. 469, 473 (2017). General Laws c. 272, § 53 (b), "provides that being a '[d]isorderly person[ ] and disturber[ ] of the peace' is a criminal offense punishable by a fine for the first offense. In order to interpret the term and ensure its constitutionality, this court has 'engrafted the Model Penal Code definition of "disorderly" onto the separate § 53 offense' of being a disorderly person. Accime, supra, quoting Commonwealth v. Chou, 433 Mass. 229, 231-232 (2001).

"As so construed, the disorderly conduct provision in § 53

requires proof that a person, 'with purpose to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof,' engaged in 'fighting or threatening, or in violent or tumultuous behavior' or created 'a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor.'" Accime, supra, quoting Commonwealth v. Sholley, 432 Mass. 721, 727 n.7 (2000), cert. denied, 532 U.S. 980 (2001), quoting Model Penal Code § 250.2 (Official Draft and Revised Comments, 1980).

"The comments to the Model Penal Code emphasize that '[n]othing less than conscious disregard of a substantial and unjustifiable risk of public nuisance will suffice for liability.'" Accime, supra, quoting Model Penal Code § 250.2 comment 2, at 328-329 (1980). Thus, there were no specific "victims" to notify regarding the Commonwealth's decision to enter a nolle prosequi on the complaint for disorderly conduct.

Second, even had there been victims of an offense who had not been notified, the judge had no authority to "deny" the Commonwealth's entry of a nolle prosequi. General Laws c. 258B, § 3 (g), does not trump the Commonwealth's constitutional right to determine when to enter a nolle prosequi, nor vest that authority in a trial judge. See art. 30 of the Declaration of Rights. See, e.g., Commonwealth v. Hart, 149 Mass. 7, 8-9 (1889):

"Only an attorney authorized by the commonwealth to represent it has authority to declare that he [or she] will not further

prosecute a case in behalf of the commonwealth. A court is not a prosecuting officer, and does not act as the attorney for the commonwealth. Its office is judicial, to hear and determine between the commonwealth and the defendant. The fact that no authorized attorney for the commonwealth is before the court does not give to it the character and authority of an attorney. A court may terminate a prosecution by discharging a defendant before trial, (Com[monwealth] v. Bressant, 126 Mass. 246 [(1879),]) or during a trial, (Sayles v. Briggs, 4 Metc. 421 [(1842];)) but it is by the judgment of a court, and not by the act of a prosecuting officer."

See also Commonwealth v. Brandano, 359 Mass. 332, 335 (1971) ("A district attorney has the absolute power to enter a nolle prosequi on his official responsibility without the approval or intervention of the court. He [or she] alone is answerable for the exercise of his [or her] discretion in this particular. His [or her] action is final").

To be sure, in some rare circumstances, the Commonwealth's authority to enter a nolle prosequi has been curtailed. Prior to trial, the power to enter a nolle prosequi is absolute in the prosecutor "except possibly in instances of scandalous abuse of authority." Commonwealth v. Dascalakis, 246 Mass. 12, 18 (1923).<sup>1</sup> See Mass. R. Crim. P. 16 (b). See generally Attorney General v. Tufts, 239 Mass. 458 (1921) (egregious misconduct including extortion for personal financial gain by prosecutor). Here, the

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<sup>1</sup> After jeopardy attaches, the prosecutor's authority to enter a nolle prosequi gives way to the defendant's right "to have that tribunal pass upon his guilt by verdict and thus secure a bar to another prosecution for the same offense." Commonwealth v. Dascalakis, 246 Mass. 12, 18 (1923). See Mass. R. Crim. P. 16 (b).

prosecutor, in the exercise of her constitutionally-guaranteed discretion, decided that the public's interests would best be served by dropping the charge of disorderly conduct against the defendant. Such a decision, in which a prosecutor decides how to allocate her limited resources, is made countless times every day in courthouses throughout the Commonwealth. The entry of a nolle prosequi in this case hardly qualifies as a "scandalous abuse of authority" warranting judicial intervention.

3. Expungement. The Commonwealth requests also that the defendant's record as a result of this incident be expunged from Boston Municipal Court, Commissioner of Probation, and Boston police department files. Ordinarily, when a nolle prosequi is entered in a case, the appropriate action to protect a defendant's privacy, and to avoid potential negative consequences, *inter alia*, with respect to housing, employment, and loan applications, is an order to seal the records. See Commonwealth v. Boe, 456 Mass. 337 (2010); G. L. c. 276, § 100C. Nonetheless, a court has inherent power to order expungement, and, in certain circumstances, expungement is appropriate under this authority. See Police Com'r of Boston v. Municipal Court of Dorchester Dist., 374 Mass. 640, 665 n.18 (1978) ("The judicial remedy of expungement is inherent and is not dependent on express statutory provision, and it exists to vindicate substantial rights provided by statute as well as by organic law").

"[I]n determining whether the remedy of sealing is the exclusive option, the critical question is whether the records accurately reflect the charging decision made by the prosecution and the police." Commonwealth v. Alves, 86 Mass. App. Ct. 210, 214 (2014).

"Where a statute might generally apply, a court still may have inherent authority to expunge at least some kinds of records, 'in the rare and limited circumstances where the judge has found by clear and convincing evidence that the order was obtained through fraud on the court.'" Commonwealth v. Moe, 463 Mass. 370, 373 (2012). See Commonwealth v. Alves, 86 Mass. App. Ct. 210, 214 (2014).

In addition, in circumstances such as these, expungement is explicitly provided for by statute. See G. L. c. 276, § 100K (a) and (a) (6) ("Notwithstanding the requirements of section 100I and section 100J, a court may order the expungement of a record created as a result of criminal court appearance, juvenile court appearance or dispositions if the court determines based on clear and convincing evidence that the record was created as a result of: . . . (6) demonstrable errors by court employees").

Upon consideration, it is ORDERED that the petition for extraordinary relief under G. L. c. 211, § 3, shall be, and hereby is, ALLOWED. The arraignment shall be vacated and set aside. The matter is remanded to the Boston Municipal Court for entry of the Commonwealth's nolle prosequi in this case.

It is FURTHER ORDERED that the Commonwealth's motion to expunge the defendant's criminal record created as a result of the improper arraignment, where the Commonwealth repeatedly requested that no arraignment take place, shall be, and hereby is, ALLOWED. The clerk of the Boston Municipal Court, Central Division, shall expunge all records of the matter from its files, and shall notify the Commissioner of Probation and the Criminal History Systems board to do so as well.

By the Court (Gaziano, J.)



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Assistant Clerk

Entered: